IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-5795

MARSHALL C. MOORE, Petitioner,

v.

JACK P. DUCKWORTH, Warden
of the Indiana State Prison, Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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November 27, 1978

78-5795

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The petitioner Marshall C. Moore respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 25, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 581 F.2d 639, a copy of which is appended hereto at A-1. Denial of rehearing is at A-8.

The opinion of the Indiana Supreme Court affirming the petitioner's conviction and sentence is reported at 293 N.E.2d 28, a copy of which is appended hereto at A-9.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered July 25, 1978. A timely petition for rehearing and rehearing in banc was denied on August 29, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Has a state criminal defendant the right under the due process clause of the fourteenth amendment not only to be proved guilty beyond a reasonable doubt but, more, to have his conviction reviewed as to the elements of guilt defined by state law upon an examination of the whole record and to have determined whether there is evidence supporting guilt beyond a reasonable doubt and not just whether there may be any evidence of guilt?

2. Whether a state convict may be denied federal habeas corpus as to claims the highest state court has held frivolous out of hand on direct appeal and for which the collateral state remedy is entirely precatory?

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S.Const. amend. XIV, §1:

> nor shall any State deprive any person of life, liberty, or property, without due process of law; ....

28 U.S.C. §2254:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

This indictment was filed charging the petitioner on June 7, 1966:

> The Grand Jury for the County of Marion in the State of Indiana, upon their oath do present that MARSHALL MOORE on or about the 16th day of April, A.D. 1966, at and in the County of Marion and in the State of Indiana, did then and there unlawfully, feloniously, purposely and with premeditated malice kill and murder BETTY JANE MOORE, a human being, by then and there unlawfully, feloniously, purposely and with premeditated malice shooting at and against the body of the said BETTY JANE MOORE with a gun, loaded with gunpowder and metal bullets, then and there held in the hand of the said MARSHALL MOORE, and did then and there and thereby inflict mortal wounds in and upon the body of the said BETTY JANE MOORE, of which mortal wounds the said BETTY JANE MOORE then and thereby died; and so the Grand Jurors aforesaid, upon their oaths aforesaid, do say and charge that the said MARSHALL MOORE, in the manner and form and by the means aforesaid, unlawfully, feloniously, purposely and with premeditated malice, did kill and murder the said BETTY JANE MOORE, then and there being contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

Tr. 4.

The petitioner was committed to the Norman Beatty Memorial Hospital, Maximum Security Division, by the Criminal Court of Marion County on September 20, 1966, after hearing evidence from two psychiatrists, Ronald H. Hull and Dwight W. Schuster, that the he was suffering from such severe mental illness that he was incompetent and incapable of assisting his attorney. The criminal court found the petitioner "of unsound mind and unable to comprehend the charges against him nor to aid and cooperate with his attorney in his own defense[,]" and sent him to the asylum "until such time as he shall become sane and placed upon trial for the criminal offense alleged to have been committed by him in this Cause." Tr. 17-19. The competency inquiry was instigated by the petitioner's attorney's petition to which was attached the statement of the petitioner's sister, wherein both the attorney and the sister expressed their belief that the petitioner was insane, filed July 13, 1966. Tr. 9-10.

Soon after the petitioner was taken to the state asylum for the insane, the petitioner was subjected to 42 electroconvulsive shock treatments, between October 28, 1966, and February 13, 1967. Supp. Tr. (114)-(169).

The criminal court on April 14, 1970, ordered the petitioner brought back from the asylum for trial, having received a report from the asylum's acting medical director, a psychiatrist, that petitioner was competent to be tried, with this reservation:

> In addition to finding Mr. Moore now competent to stand trial, the staff makes note of the likelihood of recurrence of psychotic illness. It is thus the staff's recommendation that, although Mr. Moore is considered competent to stand trial, further psychiatric treatment for him is indicated.

Tr. 34.

After being brought back and before being tried, the petitioner, largely on his own effort, over and over attempted to put to the criminal court the questions whether he had been denied speedy trial under Indiana law and under the federal Constitution, in relation to his long detention as incompetent at the state asylum without his consent and in relation to the shock treatments which he claimed had wiped out his memory of the matters with which he was charged, and whether he had been deprived of due process of law under the federal Constitution by the erasure of his memory. The criminal court ruled on November 10, 1970, after hearing, that it had no jurisdiction to determine the petitioner's competency after he had been deemed competent by the state asylum. Tr. 85. After hearings on April 28, 1971, and June 16, 1971, the criminal court held that the petitioner was competent to be tried over his claim of memory erasure and denied his motion for discharge. Supp. Tr. (215)-(216). At the hearing on June 16, 1971, Drs. Hull and Schuster, having again examined the petitioner and determined that he was better but still with a delusional psychosis or paranoid schizophrenia, testified that shock treatment erases recent memory and that so the petitioner's claim of memory loss after shock treatment was consistent

scientific fact. The psychiatrists, again testifying as the court's witnesses, declared that it was a legal not a medical determination whether the petitioner was competent to be tried after having had his memory erased by shock treatment administered by the state.

Also before trial, petitioner brought federal habeas corpus petitions in the Northern and Southern Districts of Indiana. In the proceeding in the Northern District the petitioner claimed that he was being detained in violation of his federal right to speedy trial, which claim survived the state's motion to dismiss but was mooted by the criminal court's ordering him back for trial, out of the district. In the proceeding in the Southern District the petitioner raised the federal speedy trial claim and the federal memory erasure claim, but he was remanded to the state criminal court.

This verdict was returned by the jury upon the trial of the petitioner on January 27, 1972:

> We, the Jury, find the defendant Marshall Moore guilty of the crime of Second Degree Murder, as covered by the Indictment and he shall be imprisoned in the Indiana State Prison during life.

Tr. 453. Petitioner had pled insanity and the only real issue at trial was whether he was sane when he killed his wife, since eyewitnesses testified to the petitioner's having shot her without rebuttal or impeachment.

As the criminal court's witnesses, the last at the trial, testifying under the Indiana impartial expert witness statute governing the procedure in criminal cases where the defense of insanity was asserted, Drs. Hull and Schuster, again having examined the petitioner, stated flatly that the petitioner was suffering from a grievous mental illness and was insane when he killed his wife, within the meaning of the statutory definition of insanity in Indiana. The impartial psychiatrists were not impeached and the state offered no rebuttal in the way of other psychiatric evidence or anything else, as it had the right to do. The testimony of the two psychiatrists is laid out infra at A-14.

The Indiana Supreme Court upon the petitioner's appeal from his conviction and sentence ruled against him on his claim that there was not enough evidence of his sanity to prove him guilty beyond a reasonable doubt, sanity being integral to guilty under Indiana law, applying this standard of review:

> When the sufficiency of evidence is raised on appeal, this court will consider only that evidence most favorable to the State and

> all the reasonable inferences to be drawn therefrom, and if, from that viewpoint, there is substantial evidence of probative value sufficient to establish every material element of the crime, the verdict will not be disturbed.

293 N.E.2d, at 29. The Indiana court found this evidence offered by the state enough to support the determination of sanity implicit in the verdict of guilty of the lesser included offense of second degree murder:

> Immediately after the shooting, Appellant, though subdued and weeping, nevertheless refused to identify himself when asked, responding only that he wanted to see a lawyer. No objection was made at trial to the introduction of that testimony. In addition, there is the testimony of the decedent's sisters who both indicated that the defendant had made threats on the life of his wife and had said that he could plead insanity and get away with it. The most recent of those incidents was one day before the crime was committed.

293 N.E.2d, at 31. The court took notice of the impartial psychiatric testimony:

> In the case at bar the evidence casting doubt on defendant's sanity was interposed by way of the court-appointed psychiatrists, but nonetheless the jury was entitled to reach its own conclusion after having heard all the evidence bearing on that issue, including his action shortly before and after the shooting. Trobaugh, a neighbor, testified that shortly before the shooting Appellant seemed calm, perfectly all right, and like an average person. Officer Judkins testified that at the time just before the shooting, Moore was coherent, very nice and polite.

293 N.E.2d, at 32. The court concluded that the evidence on sanity was in conflict and that it could not substitute its judgment for the jury's.

The petitioner filed or attempted to file numerous documents with the Indiana Supreme Court, both before and after the appeal was decided, and in its opinion it referred to a "pro se ... motion" criticizing appellate counsel, suggesting that the transcript was incorrect, raising a Miranda point as to the statement he made after shooting his wife that he had killed her, and asking leave to amend the briefs or withdraw the appeal. The Indiana court ruled so:

> Finding no merit in any of the Appellant's contentions, the pro se motion is denied and we proceed to decide the issues presented in this appeal.

293 N.E.2d, at 29.

Among the matter in the record on file with the Clerk of the Supreme Court of Indiana which was filed with the federal district court in this habeas corpus proceeding were the following. The "Verified Petition to Withdraw Transcript, Motion to File Brief Pro Se in Addition to Counsel's, and to Allow Time for Filing", filed July 28, 1972, mentioned the petitioner's overruling of his motion to dismiss for delay by the criminal court, it suggested that his case be returned to the criminal court for a hearing on his brief considered as a

motion for a new trial, citing authority, and it demanded a transcript and counsel and asked leave to file his own brief pro se. The Indiana Supreme Court denied the petition for the stated reason that the petitioner had shown no need for the record and that there was no assurance that the record would be kept safe. Combined motions were filed on September 19, 1972, among them a motion to compel the criminal court to allow a belated amendment to the motion to correct errors filed in that court by his trial counsel, who was different from his appellate counsel, asserting that he had been denied effective assistance of counsel and that he had not been advised of omissions from the motion to correct errors, claiming that oppressive means had been used under the guise of benevolence (the shock treatment) to deprive him of the ability to defend himself under the statute held unconstitutional in Jackson v. Indiana, and making known that he wished to raise the Jackson issues and other constitutional rights he had pointed out to his attorneys and to the criminal court. The petitioner, in this connection, denied knowledge of the crime charged to him, he denied authorizing any treatment of his mental illness, he claimed that the statute deprived him of any remedy, and he asked leave to file his own brief. None of the relief sought in the combined motions was ever granted, but according with the direction of the Indiana Supreme Court, the petitioner directed his attorney to go ahead until his state remedies had been exhausted fully and then apply for federal habeas corpus under Jackson.

The "Petition for Review of Transcript of Record by Defendant" filed October 30, 1972, asked access to the transcript so as to protect the petitioner's constitutional right to due process, and it claimed inadequate counsel and want of consultation with counsel. This petition was not granted. The "Petition to Take Judicial Knowledge of Prior Actions" filed November 10, 1972, maintained that the petitioner had not been able to appeal properly because of inadequate counsel and that he had not been able to preserve issues for appeal owing to counsel's failure, and he asked that the Indiana court take notice of the causes set forth in his petition and order the missing parts of the record brought up so that his constitutional rights could be preserved. This petition was not granted.

Having done all of the above to get the Indiana Supreme Court's attention upon his claimed violations of constitutional right, and having got nowhere else

to his court appointed appellate counsel, who would not present the federal issues he wanted presented, the petitioner wrote a letter to the chief justice of the Indiana Supreme Court citing the trouble he was having getting the matters presented he wished to be presented, stating he had no alternative but to withdraw the appeal but without waiving his right to appeal, noting his dissatisfaction with appointed appellate counsel who would present only 2 of the issues on the face of the appeal (the sufficiency of the evidence and the fairness of the reading of the instructions on sanity beyond a reasonable doubt by the prosecutor, alternatively moving to file a corrected brief upon a claim of perfunctory representation, informing the court that as it had directed him he had written appointed counsel asking that the omitted issued be presented in his brief on appeal and had got only a copy of the motion to correct errors filed in the trial court and a copy of the appellant's (his) brief, objecting that the state had deliberately deprived him of a speedy trial, protesting Miranda violations, cruel and unusual punishment, illegal search and seizure, and claiming he had been deprived of the right to defend himself by "use of drugs and/or other devices which change and/or alter the structure or functioning of the brain ...."

In this proceeding for federal habeas corpus, the Southern District of Indiana denied relief, deciding that of the three constitutional claims made by the petitioner, one (memory erasure) and three (speedy trial) had not been "formally presented and briefed" to the Indiana Supreme Court on direct appeal, the district court believing that these grounds had been raised only by the aforementioned pro se letter to the Indiana chief justice and holding that a right to raise these issues remained to the petitioner under Indiana Post Conviction Remedy Rule 1, which on its face set up a waiver on collateral proceedings of any matter not raised on direct review. The district court referred to 28 U.S.C. §2254(d), setting forth the circumstances under which the determination of a state court shall not be final, in treating the petitioner claim of denial of due process in lack of sufficient evidence from which the jury and court could have found him sane beyond a reasonable doubt:

> None of these factors are present in the case at hand. The Indiana Supreme Court provided a full and fair hearing at which the Court found that there was sufficient evidence for the jury to find beyond a reasonable doubt that the defendant was sane. This Court does not find, on consideration of the record, that the

> factual determination is not fairly supported by the record and petitioner was not deprived of the benefit of due process of law.

Order of May 2, 1977, 3. The district court issued the certificate of probable cause for appeal over the state's objection.

The Court of Appeals for the Seventh Circuit affirmed. It applied a minimalist due process standard of proof that there not be no evidence of an element of the offense, here pertinently the element of sanity, and it turned away the petitioner's claim that it was his right under the due process clause of the fourteenth amendment to have the proof of an element of the offense reviewed under the In re Winship standard of sufficient evidence not just for a finding but for a finding beyond a reasonable doubt. The Court of Appeals ruled that memory erasure and speedy trial would have to be put to the state courts on collateral proceedings there, which might be available to the petitioner upon a showing justifying failure to put those claims to the Indiana Supreme Court on direct appeal, though generally such claims could not be put on collateral state review owing to a strict waiver doctrine applied in Indiana. The Court of Appeals found that these claims had not been properly put to the Indiana Supreme Court on direct appeal while noticing that they had been put in some fashion, limiting its purview to the letter written by the petitioner to Indiana's chief justice.

REASONS FOR GRANTING THE WRIT

1. THE QUESTION IS IMPORTANT AND HAS NOT BEEN DECIDED BY THIS COURT.

The question whether proof of state criminal offenses shall be treated with respect to the due process clause of the fourteenth amendment and the quantum of proof necessary to convict thereunder by application of a standard of a quantum of evidence sufficient to prove each element of the offense beyond a reasonable doubt, or merely under the least standard of proof possible--that there be some evidence of each element, the latter the standard the Court has purported to apply to state evidence of guilt until now. Mr. Justice Stewart has put the matter succinctly:

> The power of a federal court to review the application of federal law to the facts as found also operates, however, in criminal cases originating in state courts. ... The same rule is applied in federal habeas corpus actions. See generally Townsend v. Sain, 372 U.S. 293, 318, 83 S.Ct. 745, 9 L.Ed.2d 770; Brown v. Allen, 344 U.S. 443, 506-507, 73 S.Ct. 397, 97 L.Ed. 469 (Frankfurter, J., concurring). It is not immediately apparent why application of the beyond a reasonable doubt standard of Winship to the historical facts should be any more immune from constitutional scrutiny. If, after viewing the evidence in the light most favorable to the State, cf., Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680, a federal court determines that no rational trier of fact could have found a defendant guilty beyond a reasonable doubt of the state offense with which he was charged, it is surely arguable that the court must hold, under Winship, that the convicted defendant was denied due process of law.

Freeman v. Zahradnick, 429 U.S. 1111, 97 S.Ct. 1150, at 1150-51 (1977) (Stewart, J. dissenting from denial of certiorari, joined by Marshall and Brennan, JJ.)

While the holding in In re Winship, 397 U.S. 358 (1970), that the states must prove criminal offenses beyond a reasonable doubt before punishing the accused, seems to have been limited by Patterson v. New York, 97 S.Ct. 2319 (1977), holding that the mental element differentiating degrees of homicide (not sanity itself) could be taken out of the nucleus of the offense and made a matter of mitigation as to which the accused has the burden of proof by a preponderance of the evidence, this Court only last term reaffirmed the values hallowed in Winship when in Taylor v. Kentucky, 46 U.S.L.W. (BNA) 4528 (U.S. May 30, 1978), it held that an instruction on the presumption of innocence must be given at the defendant's request in a state trial, in addition to an instruction on proof beyond a reasonable doubt.

As dear as proof beyond a reasonable doubt is, and as great a fear of governmental oppression as it represents, it cannot be secured if, as here, state appellate courts and federal habeas courts review the quantum of evidence from which a judgment of proof beyond a reasonable doubt was reached according to a standard that requires only that there not be an entire void of evidence on any element of the offense. The Indiana Supreme Court leaves the matter of guilt wholly up to the jury on the insanity defense and refuses to review the evidence of sanity at all, according to any standard:

> The substance of the argument is that as appellant offered evidence tending to prove appellant's unsoundness of mind, the jury was bound to acquit, in the absence of direct proof to the contrary. Unquestionably the sanity of the defendant must appear beyond a reasonable doubt, and, when the presumption of sanity that attends every one has been overthrown or impaired, the State must re-establish it by competent proof, or the defendant should be acquitted. But it is the province of the jury, under proper instructions, to determine when the condition of sanity has been made doubtful, and when the doubt has been removed. Id., at 604, 65 N.E. 917-918 (emphasis added).

Moore v. Indiana, 293 N.E.2d, at 31, quoting from Freese v. State, 159 Ind. 597,

65 N.E. 915 (1903). The Court of Appeals applied this rule of due process:

> A due process issue is raised only where a state court conviction is totally devoid of evidentiary support. Vachon v. New Hampshire, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974). The factual finding of sanity clearly has evidentiary support, and therefore we affirm the finding of the district court below that petitioner was not deprived of the benefit of due process of law.

581 F.2d, at 642. Hence the state supreme court left the proof of sanity beyond a reasonable doubt solely to the jury in its plenary judgment, and the federal court of appeals was satisfied with anything less than an absolute void.

The problem in petitioner's case when a Winship standard of proof beyond a reasonable doubt is applied to the evidence on sanity is what to do with the unrebutted and unimpeached testimony of the criminal court's own psychiatric experts, appointed to testify under Indiana's impartial witness statute since the defense of insanity had been put up as a defense. It is true there was some lay witness to Petitioner's behavior before, during, and after he shot his wife from the police, but altogether no rational person could draw from that witness that the petitioner was of sound mind then. It is true that there was some evidence that the petitioner was thinking before and after he shot his wife, and indeed his sisters in law and his step child testified that he had been thinking of killing his wife so that she would never leave him, but against the testimony of the two impartial psychiatrists who had examined the petitioner again and again, and who had seen him not long after the killing, it comes to nothing. In truth the jury has told us that the lay witness came to nothing. If the lay witness tended to prove anything about the petitioner's mental state, it was that he had premeditated killing his wife. Yet the jury did not convict the petitioner of premeditated murder as charged, but of unpremeditated murder, a lesser included offense.

On its facts, Winship would apply only if the trier of fact confessed on the record that he had a reasonable doubt of guilt. Here there is no such confession, and of course juries generally bring in general verdicts and confess nothing, but there is something cognate which shows that the state itself harbored to put it lightly a reasonable doubt of the petitioner's sanity and shortly after he killed his wife. The State of Indiana held the petitioner as insane and unable to be tried in its state mental hospital for over 3 years and it administered electric shock to him early in such confinement, which it must have known

would risk its ability to try him at all because of the memory erasure that always is caused by shock treatment. That 42 shock treatments were administered is mute testimony to the gravity of the petitioner's condition as perceived by the state's own doctors. The state made its own reasoned and expert judgment that the petitioner was insane. Once the state made such a determination, it could not turn around and under another guise, that of a jury, hold that he was sane beyond a reasonable doubt, if "sane", "beyond", "reasonable", and "doubt" have meaning.

There is importance in the application of the proof beyond a reasonable doubt standard to state insanity cases, too, in that there would be direct and extensive consequences for state insanity convictions if federal habeas courts were obliged under Winship to review them for proof beyond a reasonable doubt. The federal courts have often felt compelled to overrule jury verdicts of guilt where it was plain that the verdict could not have been beyond a reasonable doubt, typically where there is unrebutted and unimpeached psychiatric evidence of insanity or where the defendant has been confined for long stretches in a mental hospital, especially close to the time of the charged offense. Indeed, on the latter ground, it is evident that the Court of Appeals would have reached a different conclusion had petitioner been appealing or seeking collateral relief from a federal conviction. United States v. Westerhausen, 283 F.2d 844 (7th Cir. 1960); United States v. Kissane, 478 F.2d 1008 (7th Cir. 1973); United States v. Alden, 476 F.2d 378 (7th Cir. 1975); United States v. Velasco, 471 F.2d 112 (7th Cir. 1972). If the federal courts on habeas corpus had to apply a standard of sufficient evidenc for a finding of proof beyond a reasonable doubt and not just sufficient evidence for a finding upon the element of sanity, then such convictions as the petitioner's would not get by. Cf., Fabritz v. Traurig, 47 U.S.L.W. 2231 (4th Cir. 9-28-78) (conviction of mother for cruel and inhumane treatment in state court set aside for want of sufficient proof constitutionally to establish that mother knew she was risking her child's life by leaving her with the babysitter, despite evidence mother concealed child's injury and failed to get medical care for child out of shame and fear for her own face, where man who allegedly beat child and inflicted deadly injuries was acquitted).

It is quite appropriate that the proof beyond a reasonable doubt standard

should govern review of convictions in insanity cases. Juries are notoriously resistant to the defense, see Simon, The Jury and the Defense of Insanity (1967) (including an empirical study). Even this Court, with its aversion to the examination of factual determination, has not been chary of going into the factual basis of insanity claims:

> "But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when the conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from the constitutional provisions, and their proper application, are issues for this Court's adjudication. ... Especially in cases arising under the Due Process Clause is it important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits." Watts v. Indiana, 338 U.S. 49, 51 (1949) (opinion of Frankfurter, J.). See also Culombe v. Connecticut, 367 U.S. 568, 605 (1961) (opinion of Frankfurter, J.).

Drope v. Missouri, 420 U.S. 162, at 175 n.10 (1975). Even in Leland v. Oregon, 343 U.S. 790 (1952), holding that a defendant pleading insanity in Oregon could be required to prove his insanity beyond reasonable doubt to 10 of the 12 jurors, the Court satisfied that the defendant's guilt had been proved beyond a reasonable doubt and that there was sufficient evidence for proof beyond a reasonable doubt of sanity.

The jury in petitioner's case did as juries are wont to do where the crime is violent and the defense is insanity:

> The crime for which this defendant was convicted was a horrible one, and the defendant is clearly a very dangerous person. Moreover, whatever the jury judged him legally to be, he was obviously a sick person, or at least a person with sick inclinations.
>
> The defense in the case was insanity and the jury responded in a predictable and, I might add, sensible manner. Given the choice between finding this defendant not guilty by reason of insanity and finding him guilty, the jury had no doubt. Knowing that what it wanted to to achieve was the permanent removal of this defendant from society, it considered the guilty verdict the safer way of achieving this end.
>
> I do not know what the jurors in this case thought the consequences of an acquittal by reason of insanity would be. Normally, if the jurors ask the judge about these consequences, he instructs them that this is none of their business. At times it is even suggested to the jury that there is no way of telling how soon a defendant acquitted by reason of insanity might be released. The jury in such cases makes it its business to remove the defendant permanently by finding him guilty.
>
> . . .
>
> It would be a mistake, therefore, to conclude from the verdict of the jurors in this case that they consider the defendant to be sane; in a case such as this the jurors will find the defendant guilty even if they or the psychiatrists consider him insane.

Zeisel, The Death Penalty And The Insanity Defense, No. 14 Occasional Papers from the Law School, The University of Chicago 3-4 (April 15, 1978) (confirming experience with juries in Kalven & Zeisel, The American Jury 403 (1971).

When in petitioner's case a jury conviction upon what the Indiana Supreme Court called on direct appeal "indirect" evidence of the petitioner's sanity over against overwhelming direct, unimpeached, unrebutted, and by statute impartial expert psychiatric testimony by two doctors called by the court as its own witnesses to the petitioner's insanity when the supposed offense was done, it is patent that the proof beyond a reasonable doubt standard set by Winship has little meaning apart from the instructions that are given juries before they retire for their secret deliberations and that the standard needs to be made effective and clarified.

The standard itself is not well understood. Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299, 1309-11 (1977). In responding to a scholarly inquiry "judges thought there was an important difference [between beyond reasonable doubt and preponderance of the evidence]: almost a third of the responding judges put 'beyond a reasonable doubt' at 100%, another third put it at 90% or 95%, and most of the rest put it at 80% or 85%." Id., at 1311. Some laymen put beyond a reasonable doubt as low as 74%. Id., at 1311 n.47, citing Simon, "Beyond a Reasonable Doubt"--An Experimental Attempt at Quantification, 6 J. Applied Behavioral Sci. 203, 207 (1970). If the standard is essential to due process, then it is urgent that the standard be given meaning beyond the bare terms and beyond some vague sense that we ought to be careful not to convict the innocent. While it is true that this Court could not even agree whether there was no evidence of the mental element of the offense in Vachon v. New Hampshire, 414 U.S. 478 (1974), this Court must lay down a rule that in a clear case such as this one there simply is not enough evidence of the offense the state has defined for the accused to have been found guilty beyond a reasonable doubt. At least this Court ought to require state appellate courts and federal habeas courts to apply the standard of proof beyond a reasonable doubt to the whole record, and not leave the state appellate court as here to commit the quantum of proof absolutely

to the jury and not review it at all or leave the federal habeas court apply a minimalist any evidence standard, else proof beyond a reasonable doubt will languish for want of use. It is not too much for a reviewing court to make the sort of judgment a federal Court of Appeals made on the sufficiency of the proof of the defendant's mental capacity to make a voluntary confession in United States ex rel. Adams v. Bensinger, 507 F.2d 390 (7th Cir. 1974), cert. denied, 95 S.Ct. 1589: "The undisputed results of objective intelligence tests are of overriding significance. Surely the uncontroverted opinions of impartial psychiatrists both in court and as attending doctors in the state mental hospital are objective tests." Review of petitioner's case would afford this Court the necessary opportunity to elucidate the meaning of proof beyond a reasonable doubt.

Not only would review allow illumination of the reasonable doubt standard, but it would permit the court to illuminate how federal habeas corpus review of state convictions is to be shaped by its developing emphasis on guilt or innocence in such collateral review rather than on the rights asserted themselves.

> The general principles which control admissibility, allocation of burdens, presumptions, and sufficiency of evidence could become increasingly subject to constitutionalization with the new approach. A suggestion such as that of Justice Stewart in Freeman v. Zahradnick may be pushed very far or limited to cases which closely approximate the "no evidence" standard of Thompson v. City of Louisville. At its outer limit, the suggested principle may create a federal constitutional right to a correct verdict.

Cover & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035, at 1099 (1977). The petitioner's case is not a no evidence case and surely not one where the petitioner is contending that a wrong verdict was reached despite the application of the proper constitutional standard of proof. Rather, the petitioner would have the Court apply the proof beyond a reasonable doubt standard beyond merely the context of no proof and extend it to cases where the nature of the evidence offered to prove an element of an offense is plainly not enough for proof beyond a reasonable doubt, even though conceivably it might be enough for a finding by a preponderance, that is, where there is evidence in the record of such substance and so free of doubt that it had to create a reasonable doubt, if that term has any meaning.

2. A RECURRING PROBLEM OF THE FEDERAL HABEAS CORPUS JURISDICTION IS PRESENTED UPON WHICH THE DECISION HERE CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The Court of Appeals for the Seventh Circuit held that the petitioner had not exhausted a post-conviction state remedy which the state might choose to make available to him, although generally it would not make the remedy available to one in his place who could have raised the issues on direct appeal, withal the petitioner on his own with no help from state-appointed counsel on appeal had had put the issues to the state supreme court and they had been summarily and disdainfully disposed against the petitioner by that court in its opinion on direct appeal. The Court of Appeals noticed that the petitioner could have the issues treated by the state courts on collateral review only by the grace of those courts and not of right, upon a showing of good cause for failure to present the issues on direct appeal, that is, he could have the issues treated if the state courts would waive what otherwise would be taken, under firmly established state law codified in the post-conviction rules of the state supreme court, as a waiver of review on direct appeal. Thus was the petitioner prevented from having a federal adjudication of his constitutional claims that he had been denied due process of law under the fourteenth amendment by the erasure of his memory by the state while in its custody in a state mental asylum having been found insane and incompetent to stand trial, such that he could not fairly defend himself at trial, and that he had been denied speedy trial by his confinement of more than three years at the state asylum, from 1966 to 1970, after his arrest and before trial, particularly under the then recent decision of this Court in Jackson v. Indiana, 406 U.S. 715 (1972).

It was the ruling of the Court of Appeals that while the petitioner had put the issues of memory erasure and speedy trial as federal constitutional claims to the Indiana Supreme Court on direct appeal, he had not put them fairly but only obliquely, the Court of Appeals looking only to the last document proffered the state supreme court by the petitioner, a letter to Chief Justice Arterburn, and ignoring the other documents he had tendered previously in which he raised these same claims over and over. The record makes clear that the state criminal court had heard and decided both the memory erasure and speedy trial issues against the petitioner before trial, upon a consideration of the facts and theories making up the claims.

If it is important that state prisoners have a way to put constitutional claims affecting their detention to the federal courts after they have tried to put their claims to the state courts but have been ignored or had their claims disposed summarily or percursorily, then the petitioner's case presents an important question which recurs, because of the well known difficulty indigent prisoners have getting legal counsel causing them to file their own papers in rude fashion, and a question upon which other circuit Courts of Appeal have reached the contrary result. One might fairly say that the problem posed is the difficulty state prisoners have getting the state courts' attention to their constitutional claims.

The decision that the petitioner had not exhausted state remedies as to his constitutional memory erasure and speedy trial claims of the Seventh Circuit conflicts with these decisions of other Circuits on the same point of federal habeas corpus jurisdiction: United States ex rel. Meadows v. State, 426 F.2d 1176 (2d Cir. 1970); Rice v. Wolff, 513 F.2d 1176 (2d Cir. 1970); Jenkins v. Adkins, 514 F.2d 1078 (10th Cir. 1975) (state remedies exhausted on constitutional claim of exclusion of alibi testimony though the state court had not dealt with a crucial aspect of the prisoner's contest of the state statute and had not fully come to grips with the merits, and though prisoner had not set out claims line and verse); Morris v. Wyrick, 516 F.2d 1387 (8th Cir. 1975) (state remedies for constitutional speedy trial claim held exhausted although state supreme court never expressly ruled on the claim); United States ex rel. Geisler v. Walters, 510 F.2d 887 (3d Cir. 1975) (state remedies held exhausted though state courts never ruled on merits of constitutional claim, put pro se by prisoner inarticulately and imprecisely by prisoner); LaFrance v. Bohlinger, 499 F.2d 29 (1st Cir. 1974) (state remedies exhausted although opinion of state court on appeal dealt mainly with state law issues and the prisoner's brief raised secondarily and inarticulately with constitutional claim that trial court neglected to inquire whether his statement had been made voluntarily).

The federal courts ought not indulge the irony of states, like Indiana here, which insist that federal constitutional claims be brought back to their courts after those courts have shown no interest in deciding those claims. In the petitioner's case the irony was peculiarly bitter, because as the Court of

Appeals noticed he would have had to convince the state courts that he should not be bound by his counsel's failure to take up his constitutional claims on appeal, something no one has ever succeeded in doing in Indiana because, as Justice DeBruler of the Indiana Supreme Court has declared, that court is more interested in protecting the reputations of incompetent lawyers than in protecting the rights of the convicted. Greer v. State, 321 N.E.2d 842 (Ind. 1975). There is no interest of federalism to be served by sending constitutional claims to state courts which have made plain in the premises that they do not want them. It seems that the Seventh Circuit has broken with the numerous other Courts of Appeal that have held no such interest is served then.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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Counsel for Petitioner

November 27, 1978

The Opinion of the Court of Appeals can be found at 581 F2d 639.

The Opinion of the Indiana Supreme Court can be found at 293 N.E.2d 28.

Neither has been reproduced here.

Court's witness

Dir. exam.
Dr. Schuster

WHEREUPON THE COURT CALLED WITNESSES TO OFFER AND INTRODUCE EVIDENCE AS FOLLOWS, TO-WIT:

DWIGHT SCHUSTER, called as a witness by the Court, having been duly sworn by the Court, testified as follows, to-wit:

DIRECT EXAMINATION

QUESTIONS BY THE COURT

Q. Will you tell the jury your name and occupation?

A. Doctor Dwight Schuster, physician, specializing in neuro-psychiatry.

Q. And how long have you been a physician?

A. I was licensed to practice in the State in 1944 and have been in the private practice of my specialty since 1950.

Q. Are you a member of any professional organizations?

A. Yes. I belong to the County, State and American Medical Associations. I am a fellow of the American Psychiatric Association, a diplomat of the American Board of Neurology and Psychiatry, certified in Psychiatry.

Q. Can you tell the jury what your educational background has been?

A. Graduate of Indiana School of Medicine, had internship, residency training in Neurology and

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COURT'S EVIDENCE

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and Psychiatry and after requirement of three years specialty training and two years practice was permitted to take Specialty examinations and certified in 1950 and have engaged in that specialty in this City since that time.

Q. Will you describe for the jury briefly what the specialty in psychiatry is?

A. Psychiatry deals with diseases of the mind. It is the study of the function of the mind and the treatment of conditions affecting the mind essentially.

Q. At the request of the Court did you examine the defendant, Marshall Moore, in this case?

A. Yes, sir, I have examined Mr. Moore on several occasions.

Q. Will you tell the jury when and where?

A. The original examination, all of the examinations have taken place in the Marion County General Hospital Detention Ward. The original examinations were in the month of July, 1966. I then examined him again in 1971 and last examined him this year in January, 1972.

Q. And what did you do in these examinations?

A. The examination consists of rather standard psychiatric evaluation. The eliciting of history from the individual in regards to his present circumstances, past history, family

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history, his physical status, his ability to perceive, to understand, his intellectual capacity, his mental status, which is particularly directed toward whether or not there is evidence of some mental defect, a mental disease, which prevents him from being able to understand or to behave in a rational fashion. Part of the examination is strictly observation of his behavior, both directly and from observation reported in the hospital chart, laboratory studies in regard to his physical condition and specialized examination to determine chemical analysis of the different physical attributes.

Q. As a result of these examinations, do you have an opinion, Doctor, as to whether or not on or about April the sixteenth, 1966, the defendant, Marshall Moore, suffered from a mental disease or defects, whether he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to requirements of law?

A. Yes, it is my opinion that at that time that he did lack that mental ability, lacked the ability to function in the terms that you just described.

THE COURT: Cross examination by the State.

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Cross exam.
by State of Ind.
Dr. Schuster

CROSS EXAMINATION

QUESTIONS BY MR. ALSIP, Deputy Prosecuting Atty.

Q. Good morning, Doctor Schuster. You gave us some dates, I believe, you said that you first examined the defendant in July of 1966, could you tell us briefly what your finding was at that time?

A. My findings indicated to me that Mr. Moore was suffering from a mental disease characterized by feelings of persecution, delusions, false ideas of persecution, and my diagnostic impression at that time was that this was a paranoid schizophrenic type of illness which was so severe that he was not rational and able to understand the nature of the charges against him and to help defend himself.

Q. And then you examined him again in 1971, is that correct?

A. Yes, sir.

Q. Would you please give us the approximate date of that examination and your findings at that time?

A. The examinations in 1971 were in May, 1971, which was after he had been at the Beatty Memorial State Hospital. He was markedly improved at that time in terms of his ability to converse and to discuss his general condition although he had a lack of

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Cross exam.
Dr. Schuster

memory in regards to events back in 1966. During the interim he had been treated at Beatty Hospital with electro therapy and as a result of my examinations in 1971, it was my opinion that he was improved, that his mental condition was certainly in remission. There were some suggestions of his, perhaps, persecution feelings, paranoid feelings were still present although not anyways near the same degree as they had been in 1966.

Q. To what did you attribute this lack of memory, the electro therapy?

A. Well I thought that this was one aspect of it, it is practically impossible to say exactly because there are psychological reasons why a person has memory difficulty as well but it was probably a combination of both the physical factors of the electric treatment plus the psychological element.

Q. Could you tell us, if you know, how much time you spent with this particular patient?

A. Well I really don't know. I spent a lot of time with him going over the records and all over these various times. It certainly amounted to a number of hours.

Q. And what sources of information did you have other than what was related to you by the defendant?

A. It is a little difficult to pinpoint exactly who all I might have talked to. I think that I,

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Cross exam.
Dr. Schuster

sometimes during the past year, I have talked to some members of his family and have had, of course, opportunity to see the records from the Beatty Hospital in terms of his hospitalization course and the treatment that he had up there.

Q. Would it have been helpful to interview people that knew him during the time period of April, 1966?

A. Well it certainly would not be necessary in order to make a diagnosis. In other words from a psychiatric standpoint, it was very evident from just examining Mr. Moore himself about his illness.

Q. That was in the summer of '66, I believe you testified to?

A. Yes, around July.

Q. You would not have needed that information to determine that he was ill at that point. My question is, really, would it have been helpful to you to have interviewed someone who knew him during the month and prior to April, 1966, in expressing your opinion as to his incapacity, which you just have, would it have been useful?

A. No, I don't think that it was necessary or would have been useful.

Q. Is psychiatry an exact science or is there room for differences between equally competent psychiatrists in the same field?

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APPENDIX A5

Cross exam.of
Dr. Schuster
by State

A. Well, I think in any field there is always room for differences of opinion which usually amounts to differences in certain points. I think, generally speaking, in many cases that the major issues are certainly in total agreement.

Q. If a man prepares himself and researches carefully in the area of mental disorder, can he feign it effectively?

A. Not really when it is over a period of time when it's a matter of repeated examinations, repeated observations. It would be difficult to malinger.

Q. It would be difficult but not impossible?

A. Well I am not prone to make general absolute statements when you are dealing with people.

MR. ALSIP: Thank you, Doctor.

THE COURT: Defendant, cross examination.

Cross exam.
by Def.

CROSS EXAMINATION

QUESTIONS BY MR. FOX, Counsel for Defendant

Q. For the jury, Doctor, the three occasions that you had, if I understand, July '66, May of '71, January '72, were the three times that you examined this defendant?

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A. Yes, sir.
Q. And at all times that was in the detention ward at Marion County General Hospital?
A. Yes, sir.
Q. And the July,1966, examination, am I correct it was for the purpose of determining whether he could even comprehend why he was on trial?
A. That's right.
Q. And you made a finding to the Court at that time, did you not, which is part of the Court record that the defendant was not of sufficient rationality to even stand trial?
A. That's right.
Q. And you did recommend and the Court did rule that he would then be committed to Norman Beatty Hospital?
A. Yes.
Q. He did remain there for approximately four or five years, did he not, sir?
A. Yes.
Q. And thereafter in 1971, in July, I am sorry, May of 1971, you again examined him at Marion County General Hospital after he had been at Beatty?
A. Yes, sir.
Q. Sixty-six to seventy-one, about five years or thereabouts, and at that time you made an examination, if I understood your testimony, that he

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had shown marked improvement but there was still evidence of paranoia?
A. Yes.
Q. And at that time it was subsequently determined by the Court that the defendant was sufficiently competent at that time to go on trial?
A. Yes.
Q. And you testified that there is a lack of memory about events in 1966 which, according to your direct testimony, was a combination of the physical and psychological elements, one of which included the treatment by electro shock therapy?
A. Yes, sir.
Q. And it is your opinion that on April sixteen, 1966, the man did have a mental illness, as inquired of you by the Court, making it impossible for him to understand the nature of consequences and appreciate the virtues or values or consequences of his acts?
A. Yes, sir.
Q. You mentioned he had a very severe illness, is that correct, sir?
A. Yes, I think this was a severe form of paranoid illness.
Q. In this paranoid schizophrenic, is that the term, sir?

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A. Yes, sir.
Q. We have all heard the terms but break it down to we, laymen, exactly what that means?
A. Well this means essentially that because of his mental state of a sickness in which it is often difficult to know what produces this illness but in the course of the illness where there is a splitting off of the person's ability to understand rational happenings and where he will resort to ideas, suspicions and fears and builds up, what we call a delusional pattern, where an individual believes that certain things are taking place that cause certain things to happen , perhaps I could illustrate it in terms of some of the thoughts that he had back at that time which he conveyed to me; for instance that he was suspicious in regards to people not believing him and that would not take him seriously, that he was being harassed by a group of criminals who were persecuting him, and in the terms of evaluating these things it was very bizarre type of statement which he made for which there was no objective evidence that anything of this type had taken place. And this is the essence of this type of illness, in other words that the paranoid factor is the common term, the persecution complex that the individual believes he is being persecuted

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by a person or persons and that as a result of these things that often times they react because to the individual who is sick, it is, of course, a very real thing.that they react primarily in a very defensive way, defending themselves against what persecution they feel.
Q. Doctor, as far as his behavioral patterns or his personality or his conduct, is a paranoid schizophrenic subject to rapid changes in temperament?
A. They often will show what appears to be a sudden change but usually you will find that there has been things going on under the surface and that it bursts out into the open where the behavior may be quite different from what they have been showing but you find that the individual has been thinking and mulling things over, perhaps, in his mind for a long time prior to the actual taking action on it.
Q. Then it would be consistent with your diagnosis in this hypothetical that if this defendant did at one point of time talk calmly and coherently to a police officer and within ten minutes thereafter purportedly shot his wife to death in full view of that police officer's home, would that be consistent with this type of illness?
A. Yes, it would.

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Cross exam. of Dr. Schuster by Def.

MR. FOX: No further questions of this witness.

THE COURT: State recross.

Recross by State Dr. Schuster

RECROSS EXAMINATION

QUESTIONS BY MR. ALSIP, Deputy Prosecuting Atty.

Q. Could an individual, Doctor Schuster, have such an illness which you have just described and still not be so crippled by a mental defect that he would not appreciate the wrongfulness of his acts?

A. There are certainly instances where an individual may have an understanding of the wrongfulness of his act but in this particular type of illness, because of it being a defensive matter, that he could carry it out. In other words, fearing for his own life he would react in defense of his own life that way.

Q. But what if his own life was not threatened?

A. Well this is based upon the idea that the individual in his way of thinking that it is threatened, that he is being persecuted, that something is going to happen to him or could happen to him.

MR. ALSIP: That's all.

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Witness Dr. Schuster excused

MR. FOX: No further questions.

THE COURT: Step down, Doctor. Thank you for coming.

WITNESS EXCUSED

* * * * *

THE COURT: Doctor Hull.

WITNESS ENTERED THE COURTROOM

WITNESS SWORN BY THE COURT

Dir. exam. Dr. Hull

RONALD HULL, called as a witness by the Court, having been duly sworn by the Court, testified as follows, to-wit:

DIRECT EXAMINATION

QUESTIONS BY THE COURT

Q. Will you state your name and occupation?

A. Doctor Ronald Hull. I am a physician specializing in neuro-psychiatry.

Q. And how long have you been engaged in that specialty?

A. I have been in this specialty since internship and after medical school and in private practice here in Indianapolis since 1953.

Q. Relate your educational background.

A. I was graduated from Indiana University School

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APPENDIX A12

Dir. exam.
Dr. Hull

of Medicine in 1947, licensed in the State of Indiana in that year, had internship and residency training in neurology and psychiatry and was certified by the American Board of Psychiatry in 1953.

Q. Are you a member of any professional organizations?

A. Yes, I belong to the American County Medical Society and the American Medical Associations and a fellow of the American Psychiatric Association.

Q. At the request of the Court have you examined the defendant in this case, Marshall Moore?

A. Yes, I have.

Q. And when and where?

A. Well, initially, in 1966, all these examinations were at the Marion County General Hospital and the most recent examination this month also at the Marion County General Hospital.

Q. What did you do in these examinations?

A. Psychiatry examination consists of interviewing the patient to obtain history concerning his personal background, his life, all aspects, both in social and occupational areas; inquiring into his feelings and attitudes, during the process of this evaluation is made as to his intelligence, comprehension, his judgment, his emotional reactions, all to attempt to determine his mental state.

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APPENDIX A13

Dir. exam.
Dr. Hull

Q. What were your findings, Doctor as to these examinations?

A. Starting with the first one?

Q. Yes.

A. The initial examination in 1966, at that time I felt that he was in a very severe state of mental illness characterized as a paranoid schizophrenic condition and subsequently a more recent examination determined that this condition had improved considerably, that there were some mild residuals of that illness but that for the most part it was in remission.

Q. Do you have an opinion, Doctor, as to whether or not the defendant, Marshall Moore, on or about the sixteenth day of April, 1966, as a result of a mental disease or defect, whether or not he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law?

A. In my opinion he did not have sufficient mental capacity.

THE COURT: Cross examination, State.

Cross exam.
by State of Ind.

CROSS EXAMINATION

QUESTIONS BY MR. ALSIP, DEPUTY PROSECUTING ATTY.

Q. Doctor Hull, if you know, could you tell me the

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total amount of time that you spent with this patient, the defendant?

A. I don't have any record of that. Back in '66 I am sure I saw him on two or three occasions and this is usually forty-five minutes, an hour or so, each occasion, and then I saw him, interviewed him about three times here this past month. I also saw him earlier in 1971, I omitted that, in May.

Q. What sources of information did you use, sir, in forming your opinion other than an interview of the defendant?

A. In 1966, I believe the only outside information we had to have was what we discussed, some biographical data from his lawyer, otherwise all of it was direct from the patient.

Q. Did you take any steps to measure his intelligence quotient or is this part of your examination?

A. I didn't feel that that was necessary. It was apparent that he had sufficient intellectual capacity, you could judge from his fund of knowledge, vocabulary. We didn't feel that that was necessary to measure it for testing.

Q. Did you form an opinion as to whether or not he actually remembered the circumstances of his wife's death?

A. At the time of his first examination, his memory

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concerning this was quite vague. He did not produce any actual memory of the incident that led to his arrest. Subsequently, when we saw him he had been treated and had electro shock therapy and this may also have made some difference in his memory but at any rate he hadn't recovered any memory for that period of time.

Q. So at the time you examined him the first time, which was prior to the electro therapy, his memory was not present as far as the circumstances of the arrest?

A. As best as I can recall from back then, he could not relate anything about that. At that time his thinking was relatively confused and disorganized and very difficult to communicate real well on specific matters like that.

Q. If an intelligent man informs himself of some areas of your profession, can he feign a disorder effectively?

A. I believe this would be very difficult to do. There is some of the aspects of this particular mental illness that I think would be almost impossible to feign.

Q. Is psychiatry an exact science or is there room for differences, honest differences, between equally competent psychiatrists?

A. Yes, there are.

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Cross exam. by Def. Dr. Hull

MR. ALSIP: Thank you, Doctor.

THE COURT: Defendant cross examination.

CROSS EXAMINATION

QUESTIONS BY MR. FOX, Counsel for Defendant

Q. Doctor, you have examined this defendant three times, am I correct?
A. Yes.
Q. I mean, well three different years, the first one I didn't catch the month, was that July, 1966; I will ask if it was at the same time as Doctor Schuster?
A. Yes.
Q. July of '66, May of '71 and January of '72?
A. That's right.
Q. Is it not a matter of fact, Doctor, that the examination in July of '66 was for the purpose of determining whether or not this defendant had sufficient comprehension to go on trial?
A. Yes,it was.
Q. And your findings as reported to this Court at that time, am I correct, were that he did not have sufficient comprehension to understand the nature of the charges against him and to aid in his defense?

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Cross exam. by Def. Dr. Hull

A. Yes.
Q. And he thereafter was committed by this Court to Beatty Hospital, was he not, sir?
A. Yes, he was.
Q. And thereafter you examined him in May of 1971, also at the General Hospital detention ward, is that correct, sir?
A. Yes.
Q. And at that time it was for the purpose of determining whether he had recovered to the point where he could then stand trial?
A. Yes, sir.
Q. And you made a finding at that time that he had recovered sufficiently to stand trial?
A. That is correct.
Q. And your examination of January, 1972, also at General Hospital, am I correct, was as a Court appointed doctor to determine whether or not in your opinion the man had the mental competency recited by the Judge on or about April sixteen, 1966, is that correct?
A. Yes.
Q. You mentioned, Doctor, in your testimony that there had been no actual memory of the incidents leading to his arrest in 1966 and that when you next saw him he had been to Beatty in the meantime, is that correct?

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Cross exam. by Def. Dr. Hull

A. Yes.
Q. And that he had been subjected to electro shock therapy while a patient there?
A. Yes, he had.
Q. And that, am I correct,Doctor, is it your testimony that the treatment by electro shock therapy does destroy memory?
A. To a certain extent and this is somewhat variable in the degree of it.
Q. Yes. One man's memory may be destroyed more than another?
A. That's right.
Q. And it is a permanent destruction of memory to whatever degree resulting directly from electro shock treatments?
A. Well, I might explain that. The memory impairment that would be permanent would almost all be related to the period of time during which the person was taking these treatments and perhaps some events recent history just prior to the series of treatments.
Q. Would his loss of memory, would he lose memory of recent events rather than remote events?
A. Just recently prior to the series of treatments.
Q. Therefore, a patient who has a memory loss as a result of electro shock therapy may remember his childhood but may not remember a month ago?

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Cross exam. by Def. Dr. Hull

A. That's right.

MR. FOX: No further questions of this witness.

THE COURT: Any recross by the State?

MR. ALSIP: Yes, Your Honor.

Recross exam. by State of Ind.

RECROSS EXAMINATION

QUESTIONS BY MR. ALSIP, Deputy Prosecuting Atty.

Q. Would you define, Doctor Hull, if you can, recently prior to the treatments, for example, If treatments were given in September or October, would the patient remember events the previous Spring?
A. Well as I mentioned, the amount of memory disturbance can be quite variable from person to person. It could go back for some events; some things, several months, I couldn't say exactly how many, the farther back the less the memory impairment.
Q. The farther back, the less the memory impairment?
A. Yes.

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MR. ALSIP: Thank you, Doctor.

MR. FOX: No further questions.

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Supreme Court, U. S.
FILED
DEC 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5795

MARSHALL C. MOORE,

Petitioner,

-vs-

JACK R. DUCKWORTH, WARDEN
OF THE INDIANA STATE PRISON,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THEODORE L. SENDAK
Attorney General of Indiana

L. LLOYD UHLMER
Deputy Attorney General

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5795

MARSHALL C. MOORE,

Petitioner,

-vs-

JACK R. DUCKWORTH, WARDEN
OF THE INDIANA STATE PRISON,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

QUESTION PRESENTED

Whether the Petitioner has presented any sufficient reason for this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit in a habeas corpus case under 28 U.S.C. §2254 in light of the ample evidentiary support for the Petitioner's state conviction for Second Degree Murder and the Petitioner's failure to exhaust his available state remedies with respect to certain issues.

STATEMENT OF THE CASE

A.

NATURE OF CASE

This case is a habeas corpus action by an Indiana prisoner pursuant to 28 U.S.C. §2254.

B.

COURSE OF THE PROCEEDINGS BELOW

The Petitioner, Marshall C. Moore, shot and killed his wife in April of 1966 and was indicted for murder in the first degree soon afterward. His retained counsel moved for a competency determination, and he was accordingly examined by two court-appointed psychiatrists. A hearing, at which it was determined that the Petitioner was not competent to be tried, was held, and he (the Petitioner) was committed to Beatty Hospital where he was held until 1970. In April of 1970 the director of Beatty Hospital reported to the state trial court that the Petitioner was competent to stand trial, and at a hearing in June of 1971, the two psychiatrists who had examined him in 1966, agreed that he was competent. The state trial court found that the Petitioner was competent to stand trial.

The Petitioner's trial was held in January of 1972. At the conclusion of the trial, the jury returned a guilty verdict (murder in the second degree), and the Petitioner was sentenced to life imprisonment.

The Petitioner appealed his conviction to the Indiana Supreme Court and was represented by court-appointed counsel during the course of that appeal. The only issues

presented to that Court were insufficiency of evidence and insanity. The Indiana Supreme Court affirmed the conviction in March of 1973. See, Moore v. State, 293 N.E.2d 28 (Ind. 1973).

In March of 1975, the Petitioner filed a Petition for a Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254, in the United States District Court, Southern District of Indiana. The District Court denied a writ in May of 1977. A certificate of probable cause was issued by the District Court, and the Petitioner appealed to the United States Court of Appeals for the Seventh Circuit. The Circuit Court affirmed the decision of the District Court (See, Moore v. Duckworth, 581 F.2d 639 (7th Cir. 1978), and the Petitioner is now seeking review of that decision.

ARGUMENT

The Petitioner's state court conviction has ample evidentiary support.

The Petitioner's first claim in the habeas corpus proceedings below was, in essence, that he had been convicted even though his sanity (at the time of the act) had not been proved beyond a reasonable doubt. The Petitioner has never disputed the finding that he shot his wife. Both the District Court and Circuit Court found against the Petitioner on the merits of his sanity claim, and the Petitioner is now, apparently, challenging the standard of review that was utilized by those courts. It is clear, however, that the Circuit Court applied the correct standard and that the decision of that Court was correct.

The issue of sanity is, of course, one of fact and must be examined in the context of a habeas corpus case under applicable state law, not federal law. Leland v. Oregon 343 U.S. 790, 72 S.Ct. 1002 (1952). The Circuit Court, therefore, first reviewed the facts in the context of Indiana law, 581 F.2d at 641-642, and concluded, as follows:

> "The Indiana Supreme Court provided a full and fair hearing on this issue and found that there was sufficient evidence for the jury to find beyond a reasonable doubt that the defendant was sane. A due process issue is raised only where a state court conviction is totally devoid of evidentiary support. Vachon v. New Hampshire, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974). The factual finding of sanity clearly has evidentiary support, and therefore we affirm the finding of the district court below that petitioner was not deprived of the benefit of due process of law."
> (581 F.2d at 642)

Thus, it is apparent that the Circuit Court recognized the nature of the question and applied the appropriate standard of review as set out in Vachon v. New Hampshire, 414 U.S. 478, 94 S.Ct. 664 (1974) and Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624 (1960). This Court stated in Thompson v. Louisville, supra, that:

> "The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all."
> (362 U.S. at 199).

The Circuit Court recognized that review by a federal court of appeals of a state court conviction is a narrow one of due process, and not the broad exercise of supervisory power that it possesses in regard to its own trial court. Donnelly v. DeChristoforo 416 U.S. 637, 94 S.Ct. 1868 (1974). Furthermore, this standard of review is consistent with 28 U.S.C. §2254(d). Under 28 U.S.C. § 2254(d), the state court's resolution of a factual issue is presumed to be correct as long as the factfinding procedure employed by the state court was adequate. Swain v. Pressley, ___ U.S. ___, 97 S.Ct. 1224, 1231 (1977). It is undisputed that the factfinding procedure that was used by the Indiana court with respect to the Petitioner was full and fair. Therefore, it is apparent that the Petitioner's claim that the Circuit Court employed an incorrect standard of review is without merit.

In addition, it should be noted that the Indiana jury was properly instructed that the State had the burden of proving the sanity of the Petitioner at the time of the criminal act beyond a reasonable doubt, since the Petitioner had raised the issue. The Indiana Supreme Court carefully examined the sanity question on appeal and found that there was sufficient evidence for the jury to find that the Petitioner was sane beyond a reasonable doubt under Indiana law. See, Moore v. State, 260 Ind. 154, 293 N.E.2d 28 (1973). Thus, it is quite clear that the Indiana courts, as well as the federal courts in the proceedings below, properly applied the appropriate standards, and the Petitioner is not entitled to a review by this Court of his claims relating to the sanity question.

The Circuit Court correctly determined that the Petitioner has failed to exhaust his available state remedies with respect to his other claims for relief.

Exhaustion of state remedies is a prerequisite to consideration of each claim sought to be presented by a state prisoner in a federal habeas corpus proceeding. 28 U.S.C. §2254(b) and (c); Pitchess v. Davis ___ U.S. __, 95 S.Ct. 1748 (1975); Picard v. Connor 404 U.S. 270, 92 S.Ct. 509 (1971). The Exhaustion doctrine is based on the principle of comity between state and federal courts. Preiser v. Rodriquez 411 U.S. 475, 93 S.Ct. 1827 (1973). This principle of comity in habeas corpus proceedings was discussed by this Court in Picard v. Connor, supra, as follows:

> "We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent 'unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution,' Ex parte Royall, supra, 117 U.S., at 251, 6 S.Ct., at 740, it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and other in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies." (92 S.Ct. at 512).

It is therefore clear that a federal court in a proceeding under 28 U.S.C. §2254 should require exhaustion

of state remedies with respect to a claim if the claim has not been fairly presented to the stete courts and if an adequate state remedy is available. 28 U.S.C. §2254 (c).

Contrary to the contention of the Petitioner, the Circuit Court did not apply a standard with respect to the exhaustion requirement that conflicts with the decisions of other Circuit Courts (see citations on page 16 of the Petition) or the decisions of this Court, as noted above. The Seventh Circuit applied the "fair presentation" standard and determined that the Petitioner had not fairly presented his "memory erasure" and "speedy trial" claims to the state courts. The Circuit Court reviewed the Petitioner's assertion that he had presented these issues to the Indiana Supreme Court through a letter to then Chief Justice Arterburn (and through several pro se motions), see 581 F.2d at 642, and concluded, as follows:

> "Our review of the letter, having the benefit of being advised by the petitioner that the letter does include these issues, reveals that the references are at best oblique, and we cannot agree that the facts and theories of these claims were fairly presented to the Indiana Supreme Court or that the Court reached and passed on the merits of these claims."
> (581 F.2d at 642-643).

The Circuit Court then determined that an adequate and viable state remedy was available to the Petitioner under the Indiana Rules of Procedure for Post-Conviction Remedies, Rule P.C.R. 1. As a result, the Circuit Court affirmed the decision of the District Court requiring exhaustion of the "memory erasure" and "speedy trial" issues. Since the Circuit Court applied the correct standards and in light of the record before that Court,

the Petitioner is not entitled to have this Court review the Circuit Court's decision with respect to the exhaustion of state remedies.

CONCLUSION

For these reasons, the Petition for a writ of certiorari to review the judgment and order of the Seventh Circuit should be denied.

Respectfully submitted,

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